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Recycling the Process: Collaborative Interest-Based Negotiations in an Era of Climate Change

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Recycling the Process: Collaborative Interest-Based Negotiations in an Era of Climate Change*

David Aladjem**

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I. INTRODUCTION

Much has been written about the policy changes that will be necessary as we adapt to a changing climate, particularly in what is becoming known as the “water/energy nexus.” Most of the legal efforts in this arena have focused on “what” must change as we transition from the current legal regimes to more flexible and adaptive legal regimes. There is also substantial literature addressing “how” parties with diverse interests reach (or do not reach) consensus on important issues of public policy. Terms like “interest-based negotiations” are commonplace and every public agency of any consequence has used some type of “stakeholders” advisory group.

It is interesting, however, to note that relatively little has been written about the ways in which the “what” and “how” questions interact, intersect or diverge in specific policy arenas. I had the privilege to participate over the past year in a process under the aegis of the California State Water Resources Control Board (SWRCB) to address the question of how California would promote the greater use of “recycled water” (i.e., treated municipal wastewater). Rather than the normal stakeholder advisory group or the typical regulatory process of issuing a draft policy/guidance, taking comments, and then issuing a final document, the SWRCB allowed key stakeholders to wield the “drafting pen” and actually propose a policy that was adopted—with minor changes—by the SWRCB in February 2009.

This article describes the regulatory process used by the SWRCB and its highly unusual decision to allow stakeholders to wield the “drafting pen.” Additionally, it addresses the collaborative interest-based process that the stakeholders used to reach agreement on a draft policy, noting the strengths and weaknesses of the approach. Finally, the article discusses the conditions under which this approach to difficult public policy issues may serve as a paradigm for other issues in the “water/energy nexus.”

II. HISTORY OF THE RECYCLED WATER POLICY

A. *Resolution 68-16*

In 1968, the State of California adopted its “antidegradation policy,” which provided that waste products may only be discharged to high quality waters of the State when such discharges are for the “maximum benefit” of the people of California. In the context of recycled water, the antidegradation policy provided for a potential limit on the use of recycled water to replenish groundwater basins and to irrigate plants.¹

1. See STATE WATER RES. CONTROL BD., STATEMENT OF POLICY WITH RESPECT TO MAINTAINING HIGH QUALITY OF WATERS IN CAL., RESOLUTION NO. 68-16 (1968), available at http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/1968/rs68_016.pdf.

B. Resolution 77-1

In 1977, California first adopted a policy calling for the use of “reclaimed water” (now termed “recycled water”) in order to make the most efficient use of the state’s water resources. Of note for this paper, Resolution 77-1 is solely based in the historical background of recycled water as an alternative water supply; considerations of energy use and climate change are, to the modern eye, conspicuously absent.²

C. Water Reclamation Act of 1991

In 1991, the California Legislature adopted the Water Reclamation Act, which as amended, committed the state to a goal of producing one million acre-feet of reclaimed water annually by 2010.³ Coupled with that ambitious goal, the state declared that recycled water is a “valuable resource.”⁴ Thus, contrary to the implication of Resolution 68-16, this statute counseled that recycled water is not a “waste” product in need of control but is rather a resource that needs to be put to use for the benefit of the people of California.⁵

D. 2003 Recycled Water Task Force

In the early portion of this decade, the California Legislature noted that the state was not making strong progress towards the potential of over one million acre-feet of annual production of recycled water.⁶ Consequently, the Legislature chartered a “blue ribbon” committee to examine the topic of recycled water and to make recommendations regarding how California could better achieve this goal.⁷ The Task Force report found that the complexity and uncertainties associated with permitting recycled water projects were substantial impediments to the use of recycled water.⁸ The Task Force report also found that California would need new infrastructure totaling approximately \$10-15 billion to meet the 2010 goal.⁹ Notably, the Task Force report was the first document to recognize

2. See STATE WATER RES. CONTROL BD., POLICY WITH RESPECT TO WATER RECLAMATION IN CAL., RESOLUTION NO. 77-1 (1977), available at http://waterboards.ca.gov/board_decisions/adopted_orders/resolutions/1977/rs77_001.pdf.

3. CAL. WATER CODE § 13577 (West 2009).

4. *Id.* § 13580.9(b).

5. See *id.*

6. See CAL. DEP’T OF WATER RES., WATER RECYCLING 2030: RECOMMENDATIONS OF CAL. RECYCLED WATER TASK FORCE xi (2003), available at http://www.water.ca.gov/pubs/use/water_recycling_2030/recycled_water_tf_report_2003.pdf.

7. *Id.* at xii.

8. See *id.*

9. *Id.* at xi.

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the interconnection between the use of recycled water, reduced energy use, and the potential impact on climate change.

*E. Recycled Water Policy*¹⁰

In light of the need to expand and extend California's limited water supplies and the fact that approximately nineteen percent of California's total energy use is associated with the conveyance and treatment of water for domestic and agricultural use, the SWRCB began an effort to remove the obstacles preventing recycled water projects.¹¹

1. March 2007 Workshop

The first effort by the SWRCB was to ask the regulated and environmental communities for comments on the potential scope of a recycled water policy. As one might expect from such a process, most of the comments were generic in nature, as parties tried to assess whether the SWRCB would adopt a policy that served their respective (and quite differing) interests.¹²

2. September 2007 Draft Policy

Later in 2007, the SWRCB issued a draft policy that was roundly condemned, either for its complexity and implicit fear of recycled water (on the part of the regulated community) or for its failure to protect Californians from the health threats posed by recycled water (on the part of the environmental community).¹³

3. February 2008 Draft Policy

Early in 2008, after extensive comments on the September draft policy, the SWRCB issued a revised policy that made some changes but did not fundamentally change the basic character of the draft policy.¹⁴

10. STATE WATER RES. CONTROL BD., RECYCLED WATER POLICY (2009), available at http://www.swrcb.ca.gov/water_issues/programs/water_recycling_policy/docs/recycledwaterpolicy_approved.pdf [hereinafter RECYCLED WATER POLICY].

11. GARY KLEIN, CAL. ENERGY COMM'N, CAL. WATER-ENERGY RELATIONSHIP 8 (2005), available at <http://www.energy.ca.gov/2005publications/CEC-700-2005-011/CEC-700-2005-011-SF.PDF>; see RECYCLED WATER POLICY, *supra* note 10, § 1.

12. See STATE WATER RES. CONTROL BD., ADOPTION OF A POLICY FOR WATER QUALITY CONTROL FOR RECYCLED WATER, RESOLUTION NO. 2009-0011 (2009), available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2009/rs2009_0011.pdf.

13. See *id.*

14. See *id.*

F. Impasse

The result of the SWRCB's efforts in 2007 and 2008 was to develop a draft policy that neither the environmental community nor the regulated community saw as serving the needs of California. In a series of meetings and conference calls in late February and early March 2008, stakeholders representing both communities agreed that there was a strong likelihood that they could address the issue better. During the March 2008 meeting of the SWRCB, this group of stakeholders requested that the SWRCB give them 90 days to attempt to develop a consensus policy that would be substituted for the SWRCB's draft policy. The SWRCB—seeing that, at worst, granting this request would provide additional support for its policy,—granted the request but warned the stakeholders that failure to develop an alternative policy would result in the SWRCB moving forward expeditiously to finalize the February 2008 draft of the recycled water policy. As a result, control of the “drafting pen” moved from the SWRCB to the stakeholders. The open question was whether the stakeholders could make good on their belief that they could forge consensus on a policy that would meet their very different, and at times vociferously different, needs and interests.¹⁵

III. THE RECYCLED WATER STAKEHOLDERS GROUP NEGOTIATIONS

A. Phase I—Seeking Common Ground

The negotiations began with an effort to select the negotiators for both the environmental community and the regulated community. Selection of negotiators for the environmental community centered on whether the individuals who were knowledgeable and interested in the use of recycled water had the time and resources to be able to participate in an intense process that called for weekly or bi-weekly meetings for a three-month period. Selection of negotiators for the regulated community centered on a different question: balancing the different perspectives of agencies in Northern and Southern California. In both cases, there was substantial thought to select negotiators who would have the standing to convince their respective communities to adopt any policy that could be agreed and who would also be willing to search for common ground.

Actual negotiations began with an attempt to understand whether there might be sufficient common interest to justify the intensive negotiations that were proposed. Initial meetings indicated that there were a number of common concerns, most notably the recognition that recycled water would need to play a larger role in California's water supply system in response to climate change. The stakeholders came to this conclusion from several different perspectives.

15. See generally News Release, Ass'n of Cal. Water Agencies, ACWA Presents Leadership Award to Recycled Water Group (May 21, 2009), available at http://www.acwa.com/mediazone/newsreleases/view_release.asp?ID=741.

Many of the stakeholders focused on the fact that the increased use of recycled water (particularly in Southern California) would reduce the demand for water exported from the Sacramento and San Joaquin Delta areas. Other stakeholders focused on the fact that recycled water provides a more reliable source of supply than water supplies that are subject to hydrologic and regulatory variability. Still other stakeholders focused on the energy demands associated with the use of recycled water, noting that those demands are less than the energy demands associated with moving water hundreds of miles. Many, if not most, stakeholders shared more than one of these perspectives.

The stakeholders also shared the view that California's water supply system needed to adapt to climate change by more fully adopting a "portfolio" approach to water issues, wherein many different sources of water, with different attributes, contribute to long-term reliability and sustainability. This agreement took the form of a "preamble" that attempted to establish a new direction for water resources management in California, stating: "[w]e declare our independence from relying on the vagaries of annual precipitation and move towards sustainable management of surface waters and groundwater, together with enhanced water conservation, water reuse [i.e., the use of recycled water] and the use of stormwater."¹⁶ The preamble further stated:

We strongly encourage local and regional water agencies to move toward clean, abundant, local water for California by emphasizing appropriate water recycling, water conservation, and maintenance of supply infrastructure and the use of stormwater (including dry-weather urban runoff) in these plans; *these sources of supply are drought-proof, reliable and minimize our carbon footprint and can be sustained over the long-term.*¹⁷

These general agreements on broad concepts that extended well beyond the narrow scope of recycled water were critical to the eventual success of the policy, because they provided a shared framework for further discussions.

B. Phase II—Drafting the Policy

With the exception of the discussion of incidental recharge, the final recycled water policy differed only in small details from the draft prepared by the stakeholders group. Brief summaries of the key elements of the policy follow.

16. RECYCLED WATER POLICY, *supra* note 10, § 1.

17. *Id.* (emphasis added).

*C. Mandates for the Use of Recycled Water*¹⁸

The policy establishes a mandate to increase the use of recycled water by an additional 200,000 acre-feet/year by 2020 and an additional 300,000 acre-feet by 2030, both in comparison to current levels.¹⁹ Unlike most regulatory mandates, however, the policy does not place the burden of this mandate on the regulated community.²⁰ Instead, the policy states that the mandates “shall be achieved through the cooperation and collaboration of the State Water Board, the Regional Water Boards, the environmental community, water purveyors and the operators of publicly owned treatment works.”²¹ This broad mandate, which acknowledges and establishes collective responsibility for a regulatory result, is in my experience unprecedented. It reflects the stakeholders’ conclusion, validated and accepted by the SWRCB, that California will need to change its standard ways of doing business in order to successfully adapt to climate change.

*1. Salt and Nutrient Management Plans*²²

The stakeholders came to agreement relatively quickly that the way to address potential impacts from the use of recycled water on groundwater aquifers would be to encourage local water agencies, environmental groups and California’s regional water quality control boards to develop plans to: (i) understand the concentrations and loading of salts in each watershed and (ii) manage those basins to preserve beneficial uses of water.²³ This approach to watershed management recognized that recycled water is merely one source of salts in groundwater basins (and in some cases not the most significant source). Indeed, the salt and nutrient management plans explicitly encourage the holistic consideration of all sources of inflow to a groundwater basin, including stormflows.²⁴ Once again, such an approach, aimed at encouraging the long-term sustainability of these groundwater basins, represents a change in standard operating practices needed to adapt to climate change.

The salt and nutrient management plans are required to collect and use available data to consider whether the potential salinization of groundwater basins over time will interfere with the beneficial uses of those aquifers.²⁵ These plans are not intended to be “one-size fits all.” Small basins with few problems should be able to submit three to five page plans to the local regional water

18. *Id.* § 4.

19. *Id.* § 4(a)(1).

20. *Id.*

21. *Id.*

22. *Id.* § 6.

23. *Id.*

24. *Id.* § 6(b)(1)(b).

25. *Id.* § 6(b)(3).

quality control board showing that present and contemplated activities will not create problems. Larger basins with substantial problems of groundwater contamination or high levels of salinity, may need to prepare very complicated and lengthy plans.²⁶ The salt and nutrient management plans, therefore, were an attempt to build on California's long history of managing groundwater using local water agencies and institutions, but adapting that approach to the new challenges of adapting to climate change.

*i. Landscape Irrigation Projects*²⁷

One of the major areas of controversy that led to the need for a recycled water policy was the regulatory thicket encountered by agencies seeking to use recycled water to "water the grass." The policy established a streamlined permitting process that requires regional water quality control boards to permit landscape irrigation projects within 120 days of the application being completed.²⁸ To qualify for this streamlined consideration, projects are required to comply with California's water quality standards for the use of recycled water, to limit the application of recycled water to the agronomic needs of the plants receiving irrigation, comply with any salt or nutrient management plan, and adjust the use of fertilizers to reflect nutrient loads in recycled water.²⁹ Such projects need not undertake any monitoring for potential contamination other than twice-annual monitoring of priority pollutants and annual monitoring for constituents of emerging concern (CECs).³⁰ In these ways, the policy is intended to facilitate one of the most widely accepted uses of recycled water - landscape irrigation - in a way that preserves and extends California's supply of potable water. Particularly in a world where the Colorado River is expected to be a shadow of its former self, such adaptations are key to meeting the challenge of climate change.

*ii. Incidental Runoff*³¹

Streamlining the permitting of landscape irrigation projects, however, only addressed a portion of the challenges faced by such projects. The greater challenge has been the concern relating to "incidental runoff," which is the overspray or other water that inevitably leaves lands during irrigation. The environmental community, concerned that such runoff may enter a stream and threaten the environment, has historically argued that landscape irrigation

26. *See id.*

27. *Id.* § 7.

28. *Id.* § 7(b)(3).

29. *Id.* § 7(c)(1)-(4).

30. *Id.* § 7(b)(4).

31. *Id.* § 7(a).

projects require a permit under the federal Clean Water Act (the same type of permit as required for industrial discharges). The water and wastewater community, by contrast, has seen the amounts of discharge as truly “incidental” and so concluded that it is not likely that there will be any impacts from incidental recharge. Consequently, they have firmly resisted any call that such projects require NPDES permits.

The stakeholders group struggled long and hard to bridge the yawning chasm between these positions. After agreeing on most of the rest of the policy, the stakeholders agreed to a compromise position and sought to obtain support for that compromise from their respective communities. Both groups of stakeholders found that the effort at compromise was rejected by their respective communities as giving away too much. The result was that the SWRCB was required to propose this term, which was the only case in which the stakeholders group was unsuccessful in reaching agreement.

*iii. Antidegradation*³²

Expanding the use of recycled water forced the stakeholders group to address an extremely difficult issue: the interpretation of California’s antidegradation policy. When adopted in 1968, the purpose of the antidegradation policy was to preserve the beneficial uses of high quality waters of the State (e.g., Lake Tahoe).³³ Over time, many in the environmental community and among the regional water quality control boards have come to view the antidegradation policy as a “nondegradation” policy. Because recycled water is typically more saline than groundwater used for domestic production, a “nondegradation” interpretation of the antidegradation policy would, as a practical matter, block the increased use of recycled water.

The recycled water policy addressed compliance with the antidegradation policy in two steps. First, if a groundwater basin is within the scope of an approved salt and nutrient plan and the proposed use of recycled water (either to irrigate landscapes or replenish the groundwater basin) is consistent with that plan, there is no further regulatory requirement.³⁴ Recall that one key purpose of the salt and nutrient management plans is to encourage local agencies to collaborate and manage groundwater supplies so as to provide a long-term, sustainable water supply. Any use of recycled water that is consistent with such an effort needs no further permitting. Second, if such a plan has not yet been adopted but the landscape irrigation project or the groundwater replenishment project uses less than 10% of the assimilative capacity of the groundwater basin

32. *Id.* § 9.

33. *Id.* § 9(b); *see also* STATE WATER RES. CONTROL BD., ADMIN. PROCEDURES UPDATE: ANTIDEGRADATION POLICY IMPLEMENTATION FOR NPDES PERMITTING, (1990), *available at* www.waterboards.ca.gov/water_issues/programs/npdes/docs/apu_90_004.pdf.

34. RECYCLED WATER POLICY, *supra* note 10, § 9(d)(1).

(20% in combination with other projects), then the project needs no further permitting.³⁵ In essence, this second step establishes a *de minimis* standard for impacts on a groundwater basin in order to facilitate recycled water projects without substantially affecting a groundwater basin. The “fast track” 10%/20% path to comply with the antidegradation policy is—once again—unprecedented in California and represents yet another adaption to meeting the challenge of climate change.

*iv. Constituents of Emerging Concern*³⁶

Last, but certainly not least, was the issue of how to address so-called “constituents of emerging concern” (CECs), which are pharmaceuticals, personal care products, and the like that are commonly found in municipal wastewater. There has been much public concern about CECs, but the stakeholder group quickly agreed that there was little real scientific knowledge about this group of compounds.³⁷ Consequently, the stakeholders’ group proposed that the SWRCB and the California Department of Public Health (which is responsible for regulating drinking water in California) convene a panel of national and international experts on CECs to review the professional literature and answer several key questions. Specifically, the expert panel is charged to answer the following questions: “What are the appropriate constituents to be monitored in recycled water, including analytical methods and method detection limits? What is the known toxicological information for the above constituents? Would the above lists change based on level of treatment and use? If so, how? What are possible indicators that represent a suite of CECs? What levels of CECs should trigger enhanced monitoring of CECs in recycled water, groundwater and/or surface waters?”³⁸ The panel is to report by May 2010.

The use of an expert panel to distill the available scientific knowledge is a generally accepted institutional technique, particularly when a regulatory agency like the SWRCB retains complete authority to take any action it deems appropriate based on that information. Nonetheless, it is important to note that by moving towards an independent expert commission, the SWRCB indicated its willingness to limit the effects of politics on its regulatory activities and to follow the scientific information where it might lead. Given the substantial uncertainties associated with climate change, following the data where they lead is an important strategy for regulatory agencies to use over the next half-century; the recycled water policy offers a case study with which that collaboration can occur on a relatively amicable basis.

35. *Id.* § 10(d)(2).

36. *Id.* § 10.

37. *Id.* § 10(a)(3).

38. *Id.* § 10(b)(4).

IV. WHY DID THE PROCESS WORK?

One of the most frequent questions that has arisen since the Recycled Water Stakeholders Group presented its draft policy to the SWRCB in September 2008 is: “how did you reach agreement?” This is usually followed by the question: “can/should this process be duplicated on other complicated policy questions?” Indeed, California’s Little Hoover Commission, an independent watchdog on governmental operations, recently wrote:

In 2008, the state water board’s effort to develop a statewide water recycling policy may have helped create a new model for policy development. With near unanimous dissent among stakeholders regarding a recycling policy proposal created by state water board staff, stakeholders agreed to work together and develop a policy that they would then propose to the board. After several months, the stakeholder group—which consisted of environmental groups, municipal wastewater treatment groups and the Association of California Water Agencies—created a 13-page proposal that all sides agreed on. The proposal suggested new goals for the use of recycled water in the state, called for state- and stakeholder-funded basin plan updates dealing with salt and nutrient issues, a streamlined permitting process to encourage recycled water projects, and the creation of an expert panel to advise the state on how to handle emerging contaminant issues that might affect wastewater and efforts to clean and recycle wastewater.

[The State and Regional] Boards should use this model to develop future policies.³⁹

Thus, the chief state agency charged with improving performance of governmental functions sees the type of collaboration that characterized the recycled water policy as the wave of the future.

The recycled water policy was the product of a number of factors, all of which provided substantial incentives to the members of the stakeholders group to reach agreement. Specifically, as noted above, the members of the stakeholders group were chosen, in part, because they had individual and professional interests in advancing the use of recycled water in California. Thus, at least in the water and wastewater communities,⁴⁰ there was a conscious choice not to include as negotiators individuals who were skeptical of the need for recycled water or who doubted its safety when used in a manner consistent with applicable laws and regulations. By only including as participants those mentally

39. CAL. LITTLE HOOVER COMM’N, CLEARER STRUCTURE, CLEANER WATER: IMPROVING PERFORMANCE AND OUTCOME AT THE STATE WATER BDS. 79 (2009).

40. In only discussing considerations from the perspective of the water and wastewater communities, I do not mean to suggest that the environmental community did not share these views. Much of what I discuss in this section is based on internal discussions among the water and wastewater communities; as a member of those communities, I was not privy to similar discussions among the environmental community. I assume, from comments on the part of the environmental community’s representatives on the Recycled Water Stakeholders Group, that many—if not most—of my comments would apply to the environmental community as well.

beyond the “yuck” factor, the water and wastewater communities were trying to ensure that we created the opportunity for success.

Second, the question of increasing the use of recycled water in California was a relatively sharply defined question. Many water management questions involved complicated scientific disputes (e.g., whether state and federal water projects are the main drivers in the decline of Pacific coast salmon fisheries and, if so, why); the recycled water policy did not. The most difficult scientific issue, whether CECs posed a threat to public health or the environment, was deferred to an expert panel.

Third, the parties intentionally created conditions that would foster candid discussions. Although there were many individuals in the water and wastewater communities who wished to serve as a member of the stakeholders group, we made a very conscious decision to limit the number of individuals at the negotiating table to between eight and ten, four from the environmental community, four principals from the water and wastewater communities, and two lawyers who were retained by the water and wastewater communities to draft the policy. (We did allow members of the SWRCB and its staff, representatives of the California Department of Public Health, and several consultants to observe the discussions and serve as resources on technical issues.) We believed that fewer negotiators would not fairly reflect the diversity of opinions and experiences among stakeholders and that a larger group would not provide each of the participants the opportunity to express his or her views.

In addition to keeping the negotiating group small, we agreed at the outset that the content of the negotiations would be kept confidential. We all understood that reaching agreement might (and did) mean entertaining ideas that many of our constituents would not support, at least initially. Thus, in order to thoroughly consider those ideas, the discussions were kept confidential.

Conversely, we also all agreed that it was critical to discuss the results of our deliberations regularly with our constituents. From the perspective of the water and wastewater communities, this took the place of outreach in two phases. Early in the process, particularly at the May 2008 Association of California Water Agencies meeting, we discussed with a wide variety of water district officials, the general concepts associated with the policy as it then stood. There was substantial feedback and many ideas/refinements were proposed. Later in the summer, after the policy had been substantially drafted, but while there were still a number of important outstanding issues, the Association of California Water Agencies, the California Association of Sanitation Agencies, and the California WaterReuse Association convened two statewide meetings and conference calls to discuss the draft policy. Well over 100 representatives of water districts across California attended and provided input into the final draft policy that was presented to the SWRCB in September 2008. Indeed, it was during these discussions that the water and wastewater community (as well as the environmental community) rejected the compromise on incidental runoff that the Recycled Water Stakeholders Group had negotiated. Combined with confidential

small-group negotiations, this process seemed to work reasonably well to foster candid discussions with accountability to the larger community of interests.

Fourth, the SWRCB did its part to encourage success. Although I believe that many members of the SWRCB were, at least initially, skeptical that the stakeholders could negotiate a policy, the SWRCB provided its institutional support to the process. Two members of the SWRCB (the most that is permissible under California's open meeting laws)⁴¹ attended many of the negotiating sessions, offering their thoughts not on the substance of the policy but instead offering thoughts on the needs of California for recycled water and the many constraints on the SWRCB. In addition, the SWRCB arranged for one of its top staff members to attend many of the negotiation sessions as a resource for the negotiators and arranged for members of the Department of Public Health also to attend. Finally, the SWRCB recognized that it could not direct the discussions or direction of the stakeholders group and did not attempt to do so. The SWRCB was quite clear that we had a limited time to deliberate and that the SWRCB wanted a fully developed policy. Aside from those parameters, the SWRCB stepped back and allowed the deliberations to proceed as they might. In not controlling the process, the SWRCB allowed for success to emerge.

Last, and perhaps most important, each of the stakeholders recognized that we had been presented with a unique opportunity and that we had a responsibility, to ourselves, to our respective communities and to the people of California to do our best to develop a policy that would, in fact, encourage the use of recycled water. When there were substantial disagreements over terms of the proposed policy, often someone would remind the other members of the group that we had a unique opportunity and responsibility in "holding the drafting pen" and therefore, needed to work through the disagreements. That sense of common purpose was essential to success.

In summary, the process worked because it allowed the stakeholders group to be nimble and focused. The process did not take years and was not forced to address peripheral issues that could have created more dissention (or at least detracted from the sharp focus on the use of recycled water in the urban sector). Where the process did not work, most notably in the area of incidental runoff, these same characteristics prevented the stakeholders from developing consensus among their respective communities.

V. CONCLUSION—IS THIS THE FUTURE?

The recycled water policy represented a relatively rare event,—all of the circumstances that might lead to a negotiated solution of a difficult public policy problem intersected to facilitate the resolution of that problem. More frequently,

41. CAL. GOV'T CODE § 54952.2(b)(1) (Deering 2009).

the same circumstances interfere with and prevent serious efforts at a negotiated resolution of public policy problems.

In a world that is struggling to adapt to climate change, elected officials, resource managers and other stakeholders will address the types of problems confronting the Recycled Water Stakeholders Group regularly. The experience of the Recycled Water Stakeholders Group suggests that difficult questions related to adapting to climate change can be successfully managed if the regulatory agency in charge of the problem adopts several simple, but critical measures.

First, the regulatory agency (perhaps with stakeholders) must define the problem at issue in a way that gives a sharp definition on the questions to be addressed. Vague and general problem statements (e.g., addressing climate change in the context of water resources), or conflicting problem statements (e.g., producing increased water supply reliability vs. creating a healthy ecosystem) reduce the likelihood that negotiators can reach agreement.

Second, the regulatory agency must be willing to relinquish control over the subject in question. Several members of the SWRCB and its staff had strong ideas regarding recycled water and could have - and at certain points did - place pressure on the Recycled Water Stakeholders Group to adopt their ideas. There was consensus, however, among the members of the Recycled Water Stakeholders Group that we would not necessarily adopt ideas proposed by the SWRCB or its staff unless those ideas fit within the context that we were developing. To its great credit, the SWRCB allowed the Recycled Water Stakeholders Group this type of flexibility in the interest of developing a policy that would avoid substantial challenges. That type of support for the outcome of a policy process, without attempting to dictate the results directly, was unique and critical to a successful outcome.

Third, the negotiators must be willing to look beyond the confines of the defined policy problem and address larger concerns in the context of that problem. In the case of recycled water, the policy question posed by the SWRCB quickly led to a “zero-sum” conclusion. By redefining the problem as the management of water resources in California—where use of recycled water would be an increasingly important part—and adopting the principle of “water is water,” the Recycled Water Stakeholders Group provided a conceptual umbrella allowing for compromises on some of the most difficult policy questions associated with the use of recycled water (e.g., mandates, antidegradation and CECs).

Last, but certainly not least, is a sense of common and shared responsibility. One of the themes of the negotiations was the shared perception that the proposed recycled water policy represented an opportunity for California to move aggressively towards more reliable and sustainable uses of water. Members of the Recycled Water Stakeholders Group felt a common responsibility not only to represent the interests of their respective communities together, but to develop a policy that would meet the interests of all Californians. This larger sense of responsibility allowed the group to weather the inevitable heated disagreements

and to make a conscious decision not to allow the perfect to become the enemy of the good. It is difficult, particularly in the abstract, to develop and cultivate this strong sense of responsibility in a manner that still represents the very real interests of different communities. Yet doing so may be the key to adapting to climate change successfully over the next decades.

In summary, the experience of the Recycled Water Stakeholders Group may serve as a new model for the development of public policy in narrow areas. In such sections, as contrasted with more general questions like climate change, the state of California has the opportunity to leverage public and private expertise by engaging stakeholders in a collaborative process and giving them responsibility for achieving a productive outcome. As discussed above, the Recycled Water Stakeholders Group eschewed the standard “us against them” regulatory process, wherein groups shout past each other and the regulatory agency must somehow make sense of widely disparate arguments. Particularly in a time of fiscal stringency, encouraging such processes would allow California to use the substantial expertise that resides outside the confines of state government, at relatively little cost. Perhaps this is the sort of idea that Governor Schwarzenegger was considering when he pledged to “blow up the boxes” during his initial campaign for governor. Given the many complicated problems facing California and the lack of resources on the part of state agencies, the Recycled Water Stakeholders Group may indeed be a harbinger of things to come.⁴²

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